Supp. 19
No. 625. 625
Supreme Court
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk
Supp. to Brf. of Paul & Wolf for Pet

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

Filed April 8, 1901.

No. 959.

ALBERT A. WILSON AND JOHN B. LARNER,
Trustees, Appellants,

vs.

THE HARTFORD FIRE INSURANCE COMPANY,
Appellee.

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLEE.

SAM'L B. PAUL,
Of Counsel.

ALEXANDER WOLF,
MAURICE D. ROSENBERG,
Attorneys for Defendant.

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1900.

No. 959.

ALBERT A. WILSON AND JOHN B. LARNER,
TRUSTEES, PLAINTIFFS AND APPELLANTS,
vs.
THE HARTFORD FIRE INSURANCE COMPANY,
DEFENDANT AND RESPONDENT.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The facts all appear in the Agreed Case (pp. 6-9 inclusive, of the printed Transcript of the Record), which we give in full:

Agreed Case.

Filed June 15, 1898.

In the Supreme Court of the District of Columbia.

ALBERT A. WILSON ET AL., Plaintiffs, *vs.* THE HARTFORD FIRE INSURANCE COMPANY of the City of Hartford, Connecticut, Defendant.	At Law. No. 38932.

1. Prior to April 17th, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the City of Washington, D. C., authorized the firm of Tyler & Rutherford, of said

city, at their request, to place insurance for the company, loss, if any, payable to Albert A. Wilson *et al.*, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

On said April 17th, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said City of Washington, of the Hartford Fire Insurance Company of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his prin-
12 cipal, but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by the said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancellation (the 5-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

4. A short time thereafter, to wit, on the 27th day of April ensuing, on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk and ordered the cancellation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same

in his custody, and had exclusive charge of the matter, and announced to him that the company ordered their cancellation; to which the said Tyler responded, "All right; send up and get them."

5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the clerks of Tyler & Ruther-
13 ford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, "Cancelled by order of company," which was accordingly done.

7. On the first day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

(MEM.—Of the facts recited in the second clause of paragraph 1 and in paragraphs 2, 3, 4, 5, 6, and 7 above set forth, no party connected with or interested by mortgage or otherwise in the Ivy City Brick Company had any knowledge until after the fire occurred.)

8. The existence of the two policies was never reported to the said Duncanson nor to any one connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16th, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

9. The two policies had been overlooked by Tyler
14 & Rutherford and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Ruth-

erford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancellations as those fixed between said Barrett and said Tyler & Rutherford, and cancellations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16th know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or any one connected in any interest with the Ivy City Brick Company.

11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfillment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler & Rutherford and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

12. On the morning of May 17th, after the fire, which occurred about one o'clock a. m. on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancellation, said

Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson *et al.*, trustees, that the Hartford policies had been delivered by mistake and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford
16 refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case.

13. Defendant waives any claim of laches or irregularity as to notice of loss, or as to the particular account commonly called proof of loss.

14. The parties hereto reserve the right to except to the rulings of the court on the aforegoing agreed case. The court shall be considered as having directed the jury to find a verdict in favor of the party for whom the court itself shall find in accordance with the stipulation following, and either party hereto shall be considered as having filed an objection to such ruling or rulings of the court and having duly taken exception thereto, and said party so excepting shall be allowed an appeal thereon to the Court of Appeals,

and this agreed case shall be filed in the said court as the proper bill of exceptions herein.

On the above state of facts it is agreed that should the court find for the plaintiff judgment shall enter for $2,000, with interest from October 7th, 1895, and costs.

And should the court find for the defendant, judgment shall enter for the defendant, with costs.

BLAIR & THOM,
Attorneys for Plaintiff.

WOLF & ROSENBERG,
Attorneys for Defendant.

POINTS.

Defendant relies on two propositions:

FIRST—That the Policies on which plaintiffs claim were never completed as contracts by delivery or by acceptance.

SECOND—That, if delivered and binding at any time, these Policies became void and dead by cancellation, in accordance with an agreement not in conflict with any of their conditions, and also in accordance with their conditions, had no such agreement existed; and that they were so void and dead before the time of the fire in the declaration set forth.

ARGUMENT

In support of our first proposition:

Delivery with intent to deliver, and acceptance with the intent to accept are necessary to make any contract binding on both parties to it.

If Barrett had no authority to make the contracts described in the policies, and that fact was known to Tyler & Rutherford, it cannot be conceived that the policies would bind the defendant.

If he had authority to make the contracts they describe, it must follow that *his* intent to deliver must govern the question of *binding delivery.*

So, also, with acceptance by Tyler & Rutherford. They had authority to "PLACE" INSURANCE for the plaintiff, that is, to make contracts for insurance.

Somebody had to accept any proposed contract to make it binding. Surely it could not be the plaintiff before he ever heard of the negotiations or the papers. It was a necessary implication of their employment, that Tyler & Ruthford were clothed with that function. Their intent must govern the question of *binding acceptance.*

If, as agents to place insurance for the plaintiffs, they had no authority to take anything but binding and completed papers into their hands, the result would be that their powers did not apply and could not apply as agents until, under the terms of their agreement with Barrett, the papers became binding and completed contracts. Their action was only a preliminary effort to bring about a state of things in which they could act within the scope of their powers. Such action could not commence until the conditions precedent had been fulfilled.

There is no escape from this result. They were acting only for themselves, they were bound only for themselves, as they did take delivery and did take acceptance subject to conditions precedent.

If these were not in the scope of their powers, AND IF CONDITIONS PRECEDENT CAN CONTROL THE EXISTENCE OF CONTRACT, their want of power could not destroy such conditions, could not complete the contract, but would prevent their agency from being in operation at all. Their principal was not bound in any way—if not by the conditions precedent then not by the papers they held. Their custody was not the custody of their principal. If it could not be conditional under their powers as agent, and was in fact

conditional, it could not be the custody of their principal.

Suppose that Barrett had placed the papers in Tyler's hands for inspection, to ascertain if he approved its numerous conditions, with the promise that it would be returned, to be held by Barrett until his Company decided on the acceptance of the risk. Would Tyler's custody then have been the custody of plaintiff? The plaintiff would have had no relation whatever to it. The functions of agency would not have commenced until Barrett proffered complete delivery and Tyler could make complete acceptance.

No casuistry can discover any difference between such custody and that of the agreed case. No casuistry can make his custody under the conditions he accepted an act of agency under powers as restricted as it is suggested his were. The papers had gone into his hands only as *an act of mutual convenience* to be held as agent of the plaintiff if and when they matured as contracts, or returned as an individual if they failed so to mature by the rejection of the risk.

Let us look at the acts and declarations of these parties as fixed by the agreed case.

"Barrett stated that the *proposed risk* was a special hazard, and that he doubted his authority to *accept* it before reference to his principal, but he would issue policies * * * *upon the condition that the same should not be delivered to their principals* until the *decision* of the Hartford Fire Insurance Company on *the acceptance of the risk* was duly had, and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) *by notice that the Company rejected the risk.*"

If, by any construction, this can be tortured into an intent to deliver except upon precedent condition that the *risk* MUST BE FIRST ACCEPTED by the Company, because he doubted his power himself to accept it, we are unable to comprehend it.

The phrase, "and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) by notice that the Company rejected the risk," does not qualify it in the least.

Interpreted by its context, and by the contemporaneous action of the parties, the universal canons of interpretation, it can mean only that the paper being dead by the failure to accept the risk, nothing in the paper itself shall entitle Tyler & R. to hold it. It must be given up at once for destruction on notice that the risk was rejected. It shall be subject to immediate destruction and cancellation as a paper, not necessarily as a contract. It could not be a contract covering a risk, when the risk itself had never been "accepted," when it had been *referred for acceptance or rejection before it was to be delivered.*

And on the part of Tyler & R., the agreed case says, (Sec. 3d)—"This condition (not this contract) was accepted by Tyler & Rutherford, and the two policies of insurance were thereupon written *and placed in their hands.*"

Since the counsel for plaintiff seems to see a pregnant difference between a "conditional delivery" and a "conditional acceptance" of an instrument of contract, a difference which we shall show by authority has no foundation in law, it is no strained construction of this statement to say that Tyler & R. not only agreed that the delivery was on condition precedent, but *their acceptance was on condition precedent likewise.*

In effect they said—We take these papers into our hands not accepting them absolutely. You have told us that you doubted your authority to accept the risk; we will not accept them for delivery as completed contracts for which we are to pay the consideration—the premium—until all doubt is removed and *the risk* is *accepted* by your principal.

There was not only admitted conditional delivery, but required conditional acceptance. There was neither delivery with intent to deliver, nor acceptance with intent to accept.

Such was the plain intent of Tyler when he accepted the condition. He had not accepted the papers as contracts. They had not been "placed in his hands" except under a condition, the reason for which had been clearly and distinctly stated. His acceptance to complete delivery, and without which delivery could not be complete, awaited

a condition precedent—the *acceptance* of the risk by the Company itself, about which no doubt of authority could exist.

The terms used in the dealings between the respective agents admit no other rational construction.

And when the mutual action of the parties in the premises was had, so closely on the heels of the negotiation as to make it contemporaneous and coincident, the intent shown was precisely in accord with this plain common-sense interpretation of the language they had used.

The actual text of the agreed case is plain and brief enough as a statement of the facts without the danger of epitomizing. (We refer to paragraphs 4, 5, 6 and 7 of the agreed case.)

The Company had acted. Through its special agent, known by Tyler & R. to be the representative of the Company, having authority to inspect, confirm or cancel risks for and on behalf of the Company, on his first inspection visit to Washington, only ten days after the policies had gone into the hands of Tyler & R., they were informed that the Hartford "*refused to 'carry'* the risk"—*not refused to continue*, not *refused longer to carry*—and ordered the cancellation of the said policies.

Ordered whom? It was not the province of defendant to order Tyler & R., nor the province of Tyler & R. to cancel. It was the province of the agent who was subject to its order.

And on the same day, when Barrett, on his way to the office of Tyler & R., met the member of that firm who had exclusive charge of the matter, and informed him that the Company ordered cancellation, Tyler responded, "all right, send up and get them," all possibility of controversy or claim was ended, and they became in law as effectually ours, lying in Tyler's drawer, as if they had been manually given back.

The sickness of Barrett kept him from knowing that the papers were not in his office. He did know that he had "*immediately*" ordered an entry of cancellation on his books, and the entry had been made immediately—so says the agreed case; and Tyler had forgotten all about them.

And the next step in mutual action. Three days thereafter, when the customary mutual accounts of business between the offices on the first of the month were settled, those accounts which would determine if premium was charged on the one hand and credited on the other—no charge appeared, nothing was asked for, nothing was proffered. The accounts were closed; the policies were treated as what they were—dead instruments. There was no charge and no proffer of premium to cover the ten intervening days, as must have been the case had the parties intended or understood that the risk was covered for those ten days. It would have been to the interest of both that premium should accrue, as their only compensation in commissions depended on the fact.

These acts of the parties leave no room for doubt that their intent was exactly what the plain meaning of the agreement shows upon its face.

UNLESS THEN IT IS NOT COMPETENT TO SHOW BY PAROL EVIDENCE that these papers went into Tyler & Rutherford's hands, subject to a precedent condition governing their delivery or acceptance as completed contracts, they never were contracts.

At the threshold of this question *it is worthy of grave consideration by this court in what way this question properly belongs to this case.* It would seem an anomaly to inquire if evidence of a condition precedent be admissible, *when the condition itself has already been distinctly admitted in the agreed case.*

On objection if valid a court might well rule that it was not admissible to prove that a condition of delivery or acceptance existed by agreement; but must not such condition govern when it stands admitted as a fact before the court? If it must govern then this case is concluded. The intent of the parties is established beyond controversy. *It is too late to object to the mode of proof, when the facts which establish the intent are admitted.*

We pass, however, to the discussion as if the facts were proffered in evidence instead of admitted, as they incontrovertibly are.

The whole argument of counsel for plaintiff begs the question at issue and assumes that there was unconditional delivery, and when it states any matter as fact from the agreed case remotely touching it, distinctly perverts and distorts the statement of the agreed case.

We hold and propose to establish on authority, THAT ANY INSTRUMENT IN WRITING, ALTHOUGH PASSED INTO *the hands of the party to whom it is to more by the party who makes it, must await the performance of a condition precedent either to delivery or acceptance* before it becomes a contract, and failing the performance of the condition the paper is not binding, unless it be a negotiable instrument passed to a third and innocent holder; and WE HOLD ON AUTHORITY THAT THE INSTRUMENTS HERE INVOLVED FORM NO EXCEPTION.

The courts have drawn a sharp distinction between conditions which go to make up a contract itself, and conditions which determine if and when it becomes operative and effective between the parties to it. They do not permit parol evidence to vary its conditions when it is completed as a contract by absolute delivery and absolute acceptance. Both parties must then stand by its text, because parties have agreed to that text—the two minds have met—and that text expresses what they have agreed to be bound by. In other words, the court will not permit parol evidence to show what is the contract when the writing defines it.

But the courts do permit parol evidence to show that a paper, however complete in form, although placed in the hands of the party to whom it purports to move, is not delivered or accepted, if some precedent condition is attached to such delivery or acceptance, until the exacted condition is satisfied; and the courts beyond dispute now hold that when such parol evidence is clear, and the conditions of delivery are not performed, the instrument is not a contract.

In support of this general proposition we need go no further than the case of Burke *vs.* Dulany, 153 U. S. 228, where the principle is broadly adopted that "THE MANUAL DELIVERY OF AN INSTRUMENT MAY ALWAYS BE PROVED

TO BE ON A CONDITION WHICH HAS NOT BEEN FULFILLED IN ORDER TO AVOID ITS EFFECT."

A number of cases are cited and approved by the court to which we beg to refer.

In that case, as in all cited in it, the contention was, that a different rule was "safer;" that "it prevents the uncertainty and the opportunity for controversy and imposition that would naturally follow from making the binding effect of a completely executed and delivered instrument of contract (if it be not begging the question to call that completely executed and delivered, the completeness of whose execution by reason of the character of delivery was the very point of discussion), depend upon verbal conditions of delivery;" and that "any inconvenience or hardship from its enforcement may be avoided by withholding the instrument until the suggested conditions or pre-requisites were fulfilled." This reasoning did not prevent the application of the principle adopted by the court to a negotiable note, absolutely unrestricted in its terms, and passed from the hands of the maker to that of the payee. The court announced a principle; and when a case comes before this court in which the conditions constituting the instrument before it are as clearly as possible separated from the conditions precedent attending its going into the hands of the party to whom it moves, which make delivery and acceptance merely manual, TO REFUSE TO APPLY THE PRINCIPLE IS TO OVERRULE THE COURT WHICH ANNOUNCED IT.

We affirm with absolute confidence that there is not one condition in the policies defining or restraining the powers of the agent, the obligations of the Company, the rights or restraints upon the insured, or in any way touching the text of the instrument, which does not simply form part of the contract itself to operate only when, as in the case of other instruments of contract, it is delivered or accepted; not one line or word to affect the rule laid down by the Supreme Court. All of the conditions go to the completion of the instrument, none to affect the attaching of the contract by delivery and acceptance.

In the negotiable note, to which the Supreme Court ap-

plied the principle, there is one phrase that does suggest an admission that the condition precedent which defeated it was fulfilled—the words "for value received." Here there is nothing like its equivalent.

The phrase "this policy is made and accepted subject to, etc.," gives no such suggestion. It applies and can apply only as a descriptive part of the instrument of contract.

On this interpretation of the character of the restrictions and limitations of the power of the agent in a policy of insurance, we have the direct authority of the Court of Appeals of N. Y., expressed through Justice Peckham, in Harnickell *vs.* N. Y. Life, 111th N. Y.

Counsel have attempted to avoid the force of the decision and opinion of that court, by refusing attention to the leading point of discussion and decision, and referring to a collateral and alternative ground stated in the opinion, and as to that part we think the meaning of the opinion has been misapplied.

The leading point of contention in that case was: whether conditions restraining the agent in the matter of premium payment brought home to the party to whom manual tradition was made, by a holding of the policies for months, before notice to the Company, did not preclude the suggested conditional delivery and acceptance.

What was the answer of the court? It covers every suggestion here. It said: "The condition precedent to delivery and acceptance was not affected by the restrictions." It placed the doctrine of precedent condition on the authority of Benton *vs.* Martin alone, a case in which delivery alone was touched, and used this language, exactly applicable here:

> "THE PROVISIONS IN THE POLICIES, WHICH ARE ABOVE QUOTED, RELATE TO THE POLICIES THEMSELVES AFTER THEY SHOULD BECOME EXECUTED INSTRUMENTS BETWEEN THE PARTIES."

The following explanation and comment are conclusive.

This was decisive of the case, and is authority. After deciding the case on this broad basis, the court went on to

show how, even if the case could not be determined on this broad ground, there was still another ground on which decision might rest, to wit: that even if the agent had no power under the restrictions of the policy to accept conditions precedent to the completion of the contract by delivery, Harnickell's power to impose conditions of acceptance was not restrained. And this branch of the decision is as forcible here as there, since Tyler & Rutherford's *acceptance* of the paper was upon the condition that the Company accepted the risk, and as the acceptance of the risk failed, the contract failed.

If by this high judicial authority this precise character of contract had not thus been brought within the operation of the principle so luminously and broadly stated in Burke *vs.* Dulany, we are unable to see why a policy of insurance, as an "instrument of contract," should be excluded.

Especially would it seem equitable that such a principle should stand guard over transactions by agents of distant Companies. There is no class of instruments of contract which more frequently go into the hands of others completed as instruments, but not completed as contracts, because subject to conditions of complete delivery or acceptance. The multitude of conditions and restrictions of policies would seem to make this a necessity. It would be a great hardship, a most embarrassing condition, to impose on them the rule that mere manual tradition was completed delivery; quite as great a hardship as would be the correlative rule that mere manual possession was completed acceptance. A most instructive case in this point of view is Millville Mutual Ins. Co. *vs.* Collerd, N. J. C. E. 38th N. J. 480, which, in fact, covers almost if not the whole question.

Before passing from this branch of the discussion, we ask the further attention of the court to the effect claimed by plaintiff of the phrase in the condition of delivery and acceptance," and should be subject to immediate cancellation (the five-days' notice in the policy conditions being waived) by notice that the Company rejected the risk."

The claim is:

1st. That an agreement that a provision of the policy was

waived, involves an admission that the policy containing the provision was in force, because there could be no waiver of a provision not in force.

2d. That no such agreement could be condition precedent to the attaching of the contract.

3d. That if made it must be inoperative, as it was not written upon or attached to the contract itself, because, they claim this is forbidden by the last paragraph of the policy itself, to wit:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of the Company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement, indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

4th. That cancellation can only apply to existing and active contract, and agreement to cancellation on a contingency concludes the fact that the contract was to be in operation.

5th. That unless their interpretation be correct, it would involve of necessity a payment of premium for an indefinite time without insurance in the interval between the date of the policy and its actual operation, which would be a fraud on the insured.

We think we have irrefutably shown that the plaintiff's construction of this phrase is wholly unwarranted; that the intent attributed to the parties is irreconcilable with the context, and inconsistent with the immediate action of the parties to the agreed condition.

We proceed to show THAT THE PLAINTIFF IS MISTAKEN IN THE CONSEQUENCES WHICH WOULD FOLLOW IF THE IN-

TENT WAS WHAT THEY CLAIM. It would be a binding and effective condition if it left out entirely any requirement that the Company should accept the risk before it could become operative, and read: "Upon the condition that the same should be held by Tyler & Rutherford and not delivered to their principal until the decision of the Hartford Insurance Company comes, whether or not it would order the cancellation of the policies, and they be subject to immediate cancellation on notice of such order (the five-days' notice in the policy conditions being waived)."

1st. It will not be disputed that such an agreement, once established as such, would be obligatory on the plaintiff (and if it were established as a condition precedent to the delivery of a paper, it would make no difference), unless it conflicted with some distinct condition or clear implication of the contract itself, or unless all conditions are inadmissible.

Here the postulate is that it is an admitted fact, that the condition *was made and accepted*.

2d. Unless the last paragraph of the policy operates to defeat such a condition, THERE IS NOTHING WHATEVER IN THE CONDITIONS OF THE POLICY TO FORBID ITS OPERATION.

The policy provides for its cessation as a contract at any time, at the instance of either the insured or the Company. The terms expressing this are: "This policy shall be cancelled at any time at the request of the insured; or by the Company, by giving five days' notice of such cancellation."

Both, by the terms of the paper, have a right to stop the operation of the paper as a contract—the insured to do so immediately by a request, the Company by a notice which it is the right of the insured, under the policy, to have five days before it becomes effective—and under the authority of Grace *vs.* Ins. Co., 8 Ins. L. J. 95, in which the Sup. Court acquiesced, PAROL NOTICE is effective.

NOW IT IS NOWHERE A CONDITION IN THE POLICY THAT THE INSURED MAY NOT WAIVE ANY RIGHT SECURED HIM in the instrument; it is NOWHERE REQUIRED THAT ANY WAIVER BY THE INSURED SHALL BE WRITTEN UPON OR

ATTACHED TO THE POLICY. The prohibition against waiver is that "no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

The only prohibition to the insured is—"nor shall any privilege or permission *affecting the insurance* under this policy exist or be claimed by the insured unless so written or attached." The right to assent to the immediate abandonment of the contract by notice is not a privilege or permission *affecting the insurance* under this policy. THE WAIVER WAS NOT A WAIVER BY ANY AGENT OR OFFICER, it was a waiver by the insured himself.

So there is nothing in the policy itself requiring that it be written on the paper to be effective.

When it is an agreed fact, not simply a proffer of evidence to prove as a fact, that the condition precedent to the paper going into the hands of Tyler & Rutherford was that it should be held by said Tyler & Rutherford subject to immediate cancellation by notice of an order of the Company to cancel, and that condition was accepted, we are unable to see why it should not be effective.

The policy not only provided for cancellation but for the abatement of premium and pro rata repayment. The sole effect of the condition, interpreted as it is by the plaintiff, was an agreement for insurance, terminable on notice at a stated premium. If they intended what plaintiff claims, that such was the intent of both parties, then Tyler & Rutherford placed insurance for one year terminable at the election of either party by notice, which the law allows to be by parol. That is precisely what this policy is, with the exception that the assured has the right in it to require five days' notice. It would be ridiculous to say that the power in Tyler & Rutherford to place insurance forbade them to take a policy terminable on notice without the right to five days' notice.

The only result then of the interpretation insisted on by plaintiff would be that he would owe us pro rata premium for the ten days before the notice of cancellation.

The interpretation of the plantiff would not advance his contention a single step.

The clumsiness of the contrivance to produce such a result, however, is a conclusive proof that no such meaning could have been contemplated by the two parties to the condition as stated in the agreed case.

It is a notorious fact that the method of accomplishing such a purpose is by what is known as a "binding receipt," and if the fact is not of such common knowledge as to receive judicial cognizance, still the improbability of such clumsiness is pregnant proof that no such intent moved these parties.

As for the objection that our contention as to the meaning of the condition would give us the opportunity of fraud on the insured by postponing decision for an indefinite time, but for respect for the learned counsel we would say it is frivolous. The necessary implication was that decision would be in a reasonable time. The decision was given in a reasonable time. *De minimis lex non curat.* The remedy for unreasonable delay was at all times in the hands of Tyler and Rutherford.

We pass to our second proposition:

THAT IF BINDING AT ANY TIME THESE POLICIES BECAME VOID AND DEAD BY CANCELLATION IN ACCORDANCE WITH AN AGREEMENT NOT IN CONFLICT WITH ANY OF THEIR CONDITIONS AND ALSO IN ACCORDANCE WITH THEIR CONDITIONS HAD NO SUCH AGREEMENT EXISTED, NOTICE OF CANCELLATION HAVING BEEN PROPERLY GIVEN; AND THAT THEY WERE SO VOID AND DEAD BEFORE THE FIRE IN THE DECLARATION SET FORTH.

The policies provide that they may become void by notice of cancellation.

There is no question, as we understand, of the form of the notice given (Par. 4. p. 7, Transcript of Record); no question that it was complete and effective if it was given to the proper party; no question that, if given to the proper party the policies became and were void and dead long before May 17, when the fire occurred.

As to this the terms of the policies themselves are too explicit and the authorities too distinct and unequivocal for contention. Under an equivalent condition Judge Benedict declares:

> "Neither the law nor the contract requires a written notice of cancellation. It was not necessary that the policy be returned to effect a cancelment of contract. By this contract the parties have agreed that a notice of cancelment shall put an end to it."
>
> Grace *vs.* Insurance Company, 8 Insurance Law Journal, 96.

The Supreme Court of Pennsylvania say the same in South Side Insurance Co. *vs.* Mueller, 8 Ins. L. J. 260.

It is in fact the *concessum* of every case cited by plaintiff in error.

The only question at issue in this connection is: Was the notice to Tyler & Rutherford efficient? Were they the proper parties on whom to serve such notice, rather than on the plaintiff?

It would seem a sufficient answer to say that had notice been given to the plaintiff instead of to Tyler and Rutherford but one response was probable. "We know nothing of the policies. Tyler and Rutherford have made no report of progress to us."

Had such a notice been effective, Tyler & Rutherford would have held empty papers, and continued their work under a false and hazardous impression of what they had accomplished.

The plaintiffs say they were the only parties on whom the notice could be legally served. They admit as a fact that it was served on Tyler & Rutherford; admit as a fact that at the time it was served the existence of the policies was wholly unknown to them, and in the hands of Tyler & Rutherford; admit as a fact that they were so held by Tyler & Rutherford in compliance with a condition, without the acceptance of which they would not have been issued and would not have gone into their hands at all—to-wit: that they should be held and not delivered to their

principals until the distant defendant could be advised of the risk and exercise a right of cancelation *reserved in the policy* if it disapproved the risk; admit as a fact that up to May the 16th some of the other agencies from which they held policies insisted on the same conditions as to cancelation as those fixed between said Barrett and said Tyler & Rutherford and that cancelations by orders of the different companies were so frequent that said Tyler & Rutherford could not before May 10th know how much binding insurance was on hand, and of necessary consequence, that said Tyler & Rutherford were up to that time still agents to *place insurance* for them and to fill as far as possible the desired amount: they admit that premium arrangements concerning these policies were exclusively in the hands of Tyler & Rutherford, and premium settlements were to be in the mutual monthly accounts between Barrett and Tyler & Rutherford, and that after the notice, while Tyler & Rutherford were their agents in this regard, they had in settling the mutual account *settled* that no premium was due, and had in effect given up the policies although not manually returning them; and yet they say the policies were still alive and active contracts because the notice of cancellation was not given to them.

Their argument is that:

1st. The authorities are conclusive that an agent to procure insurance, although by the terms of the policy made the agent of the insured, is not an agent for the purpose of receiving notice of cancellation—relying on Ins. Co. *vs.* Grace, 109 U. S., 298, and cognate cases.

2d. There is nothing in the agreed statement to warrant the conclusion that the brokers' agency or employment extended any farther than the procurement of the policies.

3d. "That when executed and delivered—*assuming that the delivery was unconditional and complete*—their agency ended."

4th. "That the broad rule is that notice must be given to the assured" (whether he knows or not of the existence of the policy), "and it would be inconsistent with the general

principles of the law of agency, applied in Grace *vs.* Ins. Co., to hold that *because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, for that would be the necessary effect*, with power to alter, to rescind, and to accept notice of cancellation, and bind the assured without his knowlenge or assent. To give such effect to the *mere possession* of the policy would be to *raise* a limited agency for no reasonable purpose. Moreover, it would be fraught with great danger to the vast interests of insurance.

5th. That merely *permitting the policies* to remain for a time and uncalled for in the hands of the brokers, *which is all that this record discloses*, is perfectly consistent with the idea of the termination of their agency.

6th. With the receipt of the policy a new relation is created between the insured and the broker, that of depositor and depository: the possession of the broker became, in law, the possession of the insured, and nothing more; his sole duty is to deliver the policy upon demand of the insured, or within a reasonable time without demand.

WE PROCEED TO SHOW THAT EACH AND ALL OF THESE PROPOSITIONS RESTS, TO PHRASE IT WITH ALL DUE RESPECT, UPON A MISTAKE—a mistake of the facts involved, of the law as stated, or of the application of the law as stated to the facts involved. We take them seriatim, at the hazard of tedious reiteration, commencing with the 2d as the 1st, will have discussion in another connection.

The 2d proposition is: "There is nothing in the agreed case to warrant the conclusion that the broker's agency or employment extended any further than the procurement of the policies."

Let us look at what the agreed case says and of necessity implies.

Its first paragraph is: Plaintiff "authorized the firm of Tylor & Rutherford, at their request, *to place insurance* for the company" (the plaintiff), "said Duncesson averring the amount to be placed to be the sum of $10,000, and Tyler & Rutherford averring a much larger sum."

Was this a simple agency or employment to procure the two policies of the defendant and to deliver them to the plaintiff when procured or keep them until called for? So as involve as a consequence plaintiff's 3d proposition, that when these two policies "were executed and delivered, *assuming* that the delivery was unconditional and complete, their agency ended?" Was nothing confided to them when authorized to place insurance for the company up to $10,000 except to go and get these two policies for $2,000? As the authority was *to place* insurance, and not simply to get a Policy of some named Company, it is not conceivable that if on reading any Policy sent them the conditions were unsatisfactory, or if, on information, they doubted the authority of the agent to make it, they had no discretion to send it back and supply its place by satisfactory insurance, until they had placed the whole amount; it is not conceivable that because a Policy had come into their hands for $2,000 before they had completed their commission they must send to the Plaintiff to get instructions about its retention. Their agency was continuous and their discretion full until they had completed their work, reported and placed the papers in the hands of the Plaintiff, either actually or constructively.

Then, and not till then, could the policies be fairly said to be '*suffered*' to remain in the hands of the agent.

Then, and not till then, could the suggestion apply that 'to give such effect to the *mere possession of the policy would be to receive a limited agency for no reasonable purpose.*'

It is undoubtedly true as stated in the 4th proposition that "it would be inconsistent with the general principles of the Law of Agency that because a policy is suffered to remain in the hands of the agent for its procurement he becomes the general agent of the insured, with power to "do all sorts of harmful and dangerous things including an acceptance of notice of cancelation." But the suggestion is not pertinent to the facts disclosed in the agreed case.

The implication of authority in an agent is that he may do anything not violative of instructions, nor inconsistent

with the purpose of his agency, nor the interest of his principal, which will advance the object of his agency. Here there were no instructions. Here Tyler & Rutherford distinctly announced, by unmistakable action, their authority to accept notice of cancelation; here that authority was not only directly consistent with the purpose of the agency, but distinctly in the interest of their principal, and distinctly advanced the object of their agency. Without such power their hands would have been tied, possibly to the serious damage of their principal.

In addition to this, the fact that premium payment was to be made in the mutual settlement of accounts between Barrett and Tyler & Rutherford would imply that while the Policy was in their hands undelivered to the Plaintiff notice to them was proper, because not only notice but *pro rata return of premiums* are needed to complete the right to cancel, May, Sect. 574. Return of pro rata premiums could not be made to Plaintiff. It could only be to Tyler & Rutherford in adjusting their accounts. Must the two acts be separate? one moving to the Plaintiff who could not complete the right, the other to Tyler & Rutherford, who could not recognize the fact of notice except from the plaintiff?

We see nothing in this case to distinguish the authority touching cancellation on April 27th, before they had completely placed the whole $10,000, from the authority exercised by the Agent and approved by the Court in Standard Oil Co. vs. Triumph Ins. Company, 64th N. Y., 85.

Not only was this power consistent with the purpose of the Agency until its whole object was attained, but Tyler & Rutherford had authority to make the specific engagement disclosed in the agreed case, which implied of necessity that the notice should come to them. They had discretionary power to overcome the difficulty of *procuring the desired insurance* of which Plaintiff was informed (Sect. 10 of agreed case). They had power to meet this difficulty, and *place the insurance* on any reasonable terms to fulfil the whole purpose and scope of their employment, by making an engagement that the instrument affecting it, without changing one line or letter or implication of the

instrument, without impairing by a shadow of a shade the fact of insurance being placed and affective to secure the Plaintiff up to every limitation of the instrument expressing it, should be so held that prompt effect might be given to notice of cancellation, which the Policy itself authorized, and they themselves if cancellation came might promptly perform the duty of placing insurance, not yet exhausted, and fill any gap, until they had reached the whole limit and ended their commission. They did so agree. They so agreed, not only in the interest of their principal because the insurance was refused and very properly refused unless they would so agree, but because it was a safeguard to their principal. If it had been so arranged that notice to their principal was necessary, the notice would have been effective, without their knowledge—their principal would have had to notify them of the gap in the insurance he desired—their unexhausted powers to fill the deficit would have slept until they were so notified, and the interval might have brought disaster.

The terms were reasonable to exact, and reasonable to accept. The authority to make any reasonable terms not affecting the purpose for which it was given, but consistent with it in all particulars, was of the clearest implication.

We pass to a brief consideration of the authorities cited in support of plaintiff's contention.

We think we might safely rely upon them in support of our own.

Of the whole array of citations, none but the cases, of which Grace *vs.* The American Central, 109 U. S. 278, and Hermann *vs.* Niagara, 100 N. Y. 411, are the most conspicuous and complete, have anything but a purely academic interest.

These cases, when analyzed, distinctly support our contention. They decide that the broker, employed simply to secure insurance, when he has done so, and has *delivered the policy up to his principal*, has no further relation to it, and that his principal is not chargeable with notice of can-

cellation *thereafter given* to the broker, which does not reach him before the loss, notwithstanding a custom among insurance men of giving such notices to the broker, and that the court below misinterpreted a clause in the policy which it supposed made said broker the proper party to such notice.

This is all they decide.

In all three cases the policy had been deliberately turned over to the principal *before the notice*, and the very basis of the opinion of the court, in all of them, was that only on such delivery the broker's agency in relation to the policy ceased.

The necessary implication is that *up to that time it had not ceased*, and up to that time notice of cancellation to the broker would have been efficient. In the language of Benedict J., "would have put an end to the policy."

In the Grace case Judge Harlan says:

> "At the trial it was admitted that the contract between the parties was fully executed *upon the delivery of the policy to the insured* and when the contract was consummated by the *delivery of the policy*, he ceased to be the agent of the insured, if his employment was limited solely to procure the insurance."

The policy had been procured by the broker September 26, and was by him delivered to Grace & Co. September 27. The agent of the insurance company gave notice of cancellation to said broker October 6, and the property was burned October 7, before Grace & Co. ever heard of the notice.

In the Hermann Case, 100 N. Y. 411, Judge Andrews, after stating that "the authority of the agent terminates with the procurement of the policy," adds:

> "It cannot in reason be held to continue after the insurance has been procured and the policy delivered to the principal.

> "The defendant's agent knew that Kennedy & Buel (the procuring brokers), had sent the policy to the plaintiff in New York, and it was then in his possession. Plaintiff had no knowledge of the transaction in respect to cancellation until after the fire."

The stress of the opinion is the same as in the Grace Case.

In fact, it was the predicate of plaintiff's counsel. "Such agency," he says—

> "of Kennedy & Buel existed in reference to the policy in suit was one that the law implies from the receipt and retention of the policy then procured, and it naturally would and did terminate *when the policy had been delivered to the plaintiff* and the premium paid by him. *The possession of the policy was sufficient evidence of his authority to cancel or modify it.*"

We repeat: In both of these cases, as in all of the cases to which plaintiff has referred or can refer, the policy was a live, active, accepted contract when it went into the hands of the insured. It had been accepted without qualification by the procuring broker and by him delivered into the hands of his principal. No cancelation had been ordered or notice given to the broker until after that event, and no notice had ever reached the assured thus holding his policy. The relation of the broker to it had absolutely ceased. He could no longer have negotiated modification of its terms, or returned it for any cause, without its recommitment to him by the assured. Notice to him was notice to a stranger, and was therefore no notice.

Such, and such only, were the facts and effect of these decisions.

The circumstances here widely differ. Tyler & Rutherford, authorized by the assured to place their insurance (agreed case, par 1, p. 6 of Transcript), had procured two policies under the conditions described in paragraph 2, page

7 of Transcript, as follows: Barrett, the agent for defendant, stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies upon the condition that they should be held by said Tyler & Rutherford and not delivered to their principal until the decision of the Hartford Fire Insurance Company on the acceptance or rejection of the risk was duly had, and should be subject to immediate cancellation, by notice that the company rejected the risk. The condition was accepted, and the policies went into their hands.

During the entire period between the employment of Tyler & Rutherford and the accidental falling of these papers into the hands of plaintiff, there seems to have been but one inquiry by Duncanson, manager for the insured, about the state of the insurance. According to him the only information given was that there was great difficulty in procuring the desired insurance, but, according to Tyler & Rutherford, he was informed that it was impossible to say what binding insurance they had, as some of the agencies insisted on the same conditions as those fixed between them and Agent Barrett, and cancelations were so frequent that they could not tell what was in force, no specific mention being made of defendant's policies (paragraph 10, page 8 of Transcript). There is no dispute that Tyler's statements are facts. The only doubtful point is the unimportant one, whether more was communicated to Duncanson than what he states.

Everything was left to the discretion and management of Tyler & Rutherford. They held the papers in good faith to both Plaintiff and Defendant.

They accepted the notice of cancellation, and doubtless did their best, as it was their interest to do, under their discretionary powers to fill the gap created. All this was some weeks before the Policies were ever heard of by Plaintiff, and that only when they fell by accident into his hands. Paragraphs 9 and 11, page 8 of Transcript.

Plaintiff might quite as reasonably claim on them, if, after they had been made and recognized, as dead, they had been lost in transmission from Tyler's office to Barrett's and picked up in the street.

Before closing this paper, for the length of which we proffer the excuse that it seemed necessary to thorough examination of the questions involved, we ask the Court to test the theory of the Plaintiff on a reversal of the position of the parties, on the hypothesis that we were seeking to recover premiums for these Policies, if they had never found their way by accident into Plaintiff's hands, had been sent back on April 27th, or had stayed in Tyler's drawer, and been found and returned to us by Tyler after the year was out, and there had been no fire.

By the theory the Plaintiff asks this Court to adopt, the Policies would have covered Plaintiff's interest and been earning premium of necessity all the time. The premium was earned and must be paid. The plea would be in vain that 'your Policy was never heard of.' 'I charged my agent with authority to place insurance, not to get me your policy. The paper passed into his hands on condition, both of delivery and acceptance, that it should not come into my hands until the expressed doubt of authority to issue it was removed by the action of the Company; the adverse action of the Company had promptly come while my agent still had power to place the insurance elsewhere, and he did or tried to fill the gap. He, in fact, practically gave up the Policies, and both parties settled their mutual accounts with the agreement that no premium was due.'

This plea would fall before the replication: 'That no condition precedent can affect the delivery of a Policy of insurance. That no agreed condition could have effect in any way after the Policy went into the agent's hand, because that was complete delivery and acceptance, and ended his agency, after which it stood in his custody only as if left in his care by the insured.'

The inexorable result would be that the premium must be paid. Nor would this result be changed if the Policy had been returned to the Company. In its hands by such a tenure its return would be a futile act.

How this theory would affect the vast interests of Insurance is not difficult to see. Millions of Polices have been passed into the hands of Agents authorized to place insurance, been returned to the Companies in the exercise of a wise discretion, witnout report to their employers, and replaced by more satisfactory papers. If a speculative idea of injurious consequence have any proper bearing upon the principles determinable by a Court, we affirm with confidence that those the Plaintiff asks this Court to adopt would lead to almost incalculable injury and wrong.

The Judgment appealed from was rightly given, and should be affirmed with costs.

SAML. B. PAUL,
Of Counsel.

ALEXANDER WOLF,
MAURICE D. ROSENBERG,
Attorneys for Defendant.

10128